

FILED
AUG 28 2008
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name BARNETT Michael W
(Last) (First) (Initial)

Prisoner Number P07058

Institutional Address P.O. Box 2500 G-324

VACAVILLE, Calif. 95696-2500 Calif. Medical Facility

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Michael W. Barnett
(Enter the full name of plaintiff in this action.)

vs.

Michael Knowles, Warden

(Enter the full name of respondent(s) or jailor in this action)

CV 08

4120

Case No. _____
(To be provided by the clerk of court)

PETITION FOR A WRIT
OF HABEAS CORPUS

E-filing

(PR)

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

CV 08-4120 JF

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

- (a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Superior Court Santa Clara County SAN JOSE

Court

Location

- (b) Case number, if known 198078

- (c) Date and terms of sentence 8-4-98 35 yrs to life

- (d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes ☒ No ☐

Where?

Name of Institution: California Medical Facility

Address: P.O. Box 2500 VACAVILLE CA 95696-2500

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

P/C 273.55, 243, subd (d) 1170.12, 667 (A)

3. Did you have any of the following?

Arraignment:

Yes ☒ No ☐

Preliminary Hearing:

Yes ☒ No ☐

Motion to Suppress: ?

Yes ☐ No ☐

4. How did you plead?

Guilty ☐ Not Guilty ☒ Nolo Contendere ☐

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury ☒ Judge alone ☐ Judge alone on a transcript ☐

6. Did you testify at your trial?

Yes ☒ No ☐

7. Did you have an attorney at the following proceedings:

(a) Arraignment

Yes ☒ No ☐

(b) Preliminary hearing

Yes ☒ No ☐

(c) Time of plea

Yes ☒ No ☐

(d) Trial

Yes ☒ No ☐

(e) Sentencing

Yes ☒ No ☐

(f) Appeal

Yes ☒ No ☐

(g) Other post-conviction proceeding

Yes ☐ No ☒

8. Did you appeal your conviction?

Yes ☒ No ☐

(a) If you did, to what court(s) did you appeal?

Court of Appeal 5th District Yes ☐ No ☐

Year: 9-27-2000 Result: Denied

Supreme Court of California Yes ☒ No ☐

Year: 1-11-01 Result: Denied

Any other court Yes ☒ No ☐

Year: 3-29-06 Result: Denied due to Statute

Federal Court Northern District Limitations

(b) If you appealed, were the grounds the same as those that you are raising in this

petition?

Yes _____ No ☒

(c) Was there an opinion?

Yes _____ No _____

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes _____ No ☒

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes ☒ No _____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Superior Court Santa Clara Co.

Type of Proceeding: Habeas Corpus

Grounds raised (Be brief but specific):

a. Errors of constitutional magnitude

b. 245 (A) (1)

c. _____

d. _____

Result: Denied Date of Result: ?

II. Name of Court: Sixth Appellate District

Type of Proceeding: HABEAS CORPUS

Grounds raised (Be brief but specific): CASE #

17032085

Filed 9-24-07

1 a. SAME AS ABOVE

2 b. _____

3 c. _____

4 d. _____

5 Result: Denied Date of Result: ?

6 III. Name of Court: California Supreme Court

7 Type of Proceeding: Habeas Corpus

8 Grounds raised (Be brief but specific):

9 a. SAME AS ABOVE

10 b. _____

11 c. _____

12 d. _____

13 Result: Denied Date of Result: 3-23-08

14 IV. Name of Court: _____

15 Type of Proceeding: _____

16 Grounds raised (Be brief but specific):

17 a. _____

18 b. _____

19 c. _____

20 d. _____

21 Result: _____ Date of Result: _____

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes _____ No X

24 Name and location of court: _____

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
27 support each claim. For example, what legal right or privilege were you denied? What happened?

28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 Claim ONE:

2 Appellate counsel rendered ineffective assistance of
3 counsel by failing to argue that the trial judges
4 finding that petitioner's battery with serious bodily
5 injury qualified as a serious felony, violated his
6 Federal constitutional right to jury trial because it was
7 contrary to the jury's finding in count one that the
8 allegation of personal infliction of great bodily injury
9 was not true.

10
11 Supporting facts:

12 Count one alleged corporal injury with a great bodily
13 injury enhancement under section 12022.7(d). Count two
14 alleged battery with serious bodily injury with an
15 allegation of personal infliction of serious bodily injury.
16 The jury convicted on both counts, which pertained to
17 the same assault, while finding the GBI enhancement
18 on count one not true, and the GBI allegation in
19 count two true. At sentencing, the trial judge found
20 count two was a serious felony because petitioner had
21 personally inflicted GBI on count two. Based on that
22 finding, he imposed two five year enhancements
23 under section 667(A) which permits enhancement with
24 serious felony priors only if a new offense is also
25 serious. Appellate counsel argued that the trial judge
26 erred because he withdrew from the jury the
27 option of finding that petitioner inflicted GBI on
28

Supporting Facts Con:

Count two. Appellate counsel did not argue the meritorious ground that finding infliction of GBI on count two when the jury had found the allegation not true as to count one, based on the same conduct as count two, denied petitioner his federal constitutional right to jury trial.

Supporting Cases:

Sixth Amendment rights to jury trial and assistance of counsel and Fourteenth Amendment right to Due Process; *Evitts v Lucey* (1985) 469 U.S. 387; *People v. Taylor* (2004) 118 Cal App. 4th 11, 25-30, *Evitts v. Lucey* Establishes a federal due process right to effective assistance of counsel where a state grants a appeal of a criminal conviction; *Taylor* holds a judge can't find GBI where the jury has found it not true

Ground Two (2).

Trial counsel rendered ineffective assistance of counsel by failing to object to evidence necessary to prove that his 245 prior involved personal use, and was thus a strike and serious felony prior, on grounds that the evidence was outside the record of conviction. Alternatively, appellate counsel rendered ineffective assistance by not raising the issue in

Ground Two Con:

the absence of an objection because an objection would have been futile.

Supporting facts:

A prior conviction of section 245 (A)(1) was alleged as both a strike and 667 (A) prior. At the time of petitioner's offense, the prosecution had to prove infliction of GBI or personal use of a weapon to qualify a 245 (A)(1) was either a strike or serious felony prior. At the trial of the prior conviction allegation, the prosecution introduced a probation report and the testimony of the probation officer who prepared the report that petitioner had admitted the use of a knife or screwdriver in the commission of the 245. Trial counsel objected on grounds of hearsay and Miranda, but not on the basis that the evidence was outside the record of conviction that may be considered in ascertaining the nature of a prior conviction. Appellate counsel did not raise on appeal the issue of whether the evidence was outside the record of conviction, either directly on the ground that the objection would have been futile in the trial court due to an adverse Court of Appeal decision, or as an on the record ineffective assistance claim.

Supporting Cases on Ground Two:

Sixth Amendment right to effective assistance of trial counsel. Fourteenth Amendment due process right to effective assistance of appellate counsel in a state appeal given criminal defendants as a matter of right: *People v Trujillo* (2006) 40 Cal. 4th 165. holds that a defendant's admission at a probation interview does not come within the "record of conviction" that may be considered by a factfinder at the trial of a prior conviction allegation to prove the nature of the prior.

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:
4
5
6

7 Do you have an attorney for this petition?

Yes

No ☒

8 If you do, give the name and address of your attorney:
9

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12
13 Executed on

8-24-08

14 Date

Michael W. Barnett

Signature of Petitioner

15
16
17
18
19
20 (Rev. 6/02)

CERTIFICATE OF SERVICE

Case Name: Barnett v. Knowles

Case No.: _____

IMPORTANT: You must send a copy of ALL documents filed with the court and any attachments to counsel for ALL parties in this case. You must also file a certificate of service with this court telling us that you have done so. You may use this certificate of service as a master copy, and fill in the title of the document you are filing. Please list below the names and addresses of the parties who were sent a copy of your document and the dates on which they were served. Be sure to sign the statement below. You must attach a copy of the certificate of service to each of the copies and the copy you file with the court.

I certify that a copy of the Habeas Corpus
(Name of document you are filing (i.e., opening
brief, motion, etc.)

and any attachments was served, either in person or by mail, on the persons listed below.

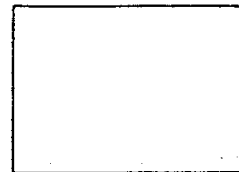
Michael Barnett

Signature

Notary NOT required

Name	Address	Date Served
Attorney General Office	455 Golden Gate Ave 11000	8-24-08
	San Francisco, CA. 94102-3664	
	Ninth District Court of Appeals	
	95 Seventh Street	
	San Francisco, CA. 94102	

EXHIBIT COVER PAGE



EXHIBIT

DESCRIPTION OF THIS EXHIBIT:

NUMBER OF PAGES TO THIS EXHIBIT: 24 PAGES.

JURISDICTION: (Check only one)

- ☐ CDCR Administrative Appeal
- ☐ California Victim Compensation
And Government Claims Board
- ☐ Municipal Court
- ☐ Superior Court
- ☐ Appellate Court
- ☒ State Supreme
- ☒ United States District Court
- ☒ United States Circuit Court
- ☐ United States Supreme Court

S157667

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MICHAEL W. BARNETT on Habeas Corpus

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780.)

George, C. J., was absent and did not participate.

**SUPREME COURT
FILED**

APR 23 2008

Frederick K. Ohlrich Clerk

Deputy

WERDEGAR

Acting Chief Justice

Name Michael W. Barnett
Address Lancaster State Prison
P.O. Box 4670 INF #14
Lancaster, Calif. 93539-4670

CDC or ID Number P02058

MC-275
SUPREME COURT
FILED

OCT 29 2007

Frederick K. Ohlrich Clerk

California Supreme Court

Deputy

(Court)

<u>Michael W. Barnett</u>	
Petitioner	
vs.	
<u>Ernie Rice, Warden</u>	
Respondent	

PETITION FOR WRIT OF HABEAS CORPUS

S157667

No.

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

- ☒ A conviction ☐ Parole
☐ A sentence ☐ Credits
☐ Jail or prison conditions ☐ Prison discipline
☐ Other (specify): _____

1. Your name: Michael W. Barnett
2. Where are you incarcerated? California State Prison, Los Angeles County
3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Ct. 1: infliction of corporal injury on mother of child with prior; Ct 2: battery with serious bodily injury;
two strike priors, two serious felony priors

- b. Penal or other code sections: Sections 273.55, 243, subd. (d); 1170.12, 667(a)

- c. Name and location of sentencing or committing court: Santa Clara County Superior Court, San Jose, CA

- d. Case number: 198078

- e. Date convicted or committed: _____

- f. Date sentenced: August 4, 1998

- g. Length of sentence: 25 years to life, consecutive to 10 years

- h. When do you expect to be released? Not eligible for parole for at least 20 years

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Carl Beatty, Deputy Public Defender, 120 Mission Street, San Jose, CA 95110

4. What was the LAST plea you entered? (check one)

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. *~~GROUND~~S FOR RELIEF~

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

Appellate counsel rendered ineffective assistance of counsel by failing to argue that the trial judge's finding that petitioner's battery with serious bodily injury qualified as a serious felony violated his federal constitutional right to jury trial because it was contrary to the jury's finding in count one that the allegation of personal infliction of great bodily injury was not true

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

Count one alleged corporal injury with a great bodily injury enhancement under section 12022.7(d). Count two alleged battery with serious bodily injury with an allegation of personal infliction of serious bodily injury. The jury convicted on both counts, which pertained to the same assault, while finding the GBI enhancement on count one not true, and the sbi allegation in count two true. At sentencing, the trial judge found count two was a serious felony because petitioner had personally inflicted gbi on count two. Based on that finding, he imposed two five year enhancements under section 667(a), which permits enhancement with serious felony priors only if a new offense is also serious. Appellate counsel argued that the trial judge erred because he withdrew from the jury the option of finding that petitioner inflicted gbi on count two. Appellate counsel did not argue the meritorious ground that finding infliction of gbi on count two when the jury had found the allegation not true as to count one, based on the same conduct as count two, denied petitioner his federal constitutional right to jury trial.

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

Sixth Amendment rights to jury trial and assistance of counsel and Fourteenth Amendment right to Due Process; *Evitts v. Lucey* (1985) 469 U.S. 387; *People v. Taylor* (2004) 118 Cal.App.4th 11, 28-30. *Evitts v. Lucey* establishes a federal due process right to effective assistance of counsel where a state grants a appeal of a criminal conviction; *Taylor* holds a judge can't find gbi where the jury has found it not true.

7. Ground 2 or Ground _____ (if applicable):

Trial counsel rendered ineffective assistance of counsel by failing to object to evidence necessary to prove that
his 245 prior involved personal use, and was thus a strike and serious felony prior, on grounds that the evidence
was outside the record of conviction. Alternatively, appellate counsel rendered ineffective assistance by not
raising the issue in the absence of an objection because an objection would have been futile.

a. Supporting facts:

A prior conviction of section 245 (a)(1) was alleged as both a strike and 667(a) prior. At the time of petiti
oner's offense, the prosecution had to prove infliction of gbi or personal use of a weapon to qualify a 245(a)
(1) was either a strike or serious felony prior. At the trial of the prior conviction allegations, the prosecutio
introduced a probation report and the testimony of the probation officer who prepared the report that peti
tioner had admitted the use of a knife or screwdriver in the commission of the 245. Trial counsel objected
on grounds of hearsay and Miranda, but not on the basis that the evidence was outside the record of convic
tion that may be considered in ascertaining the nature of a prior conviction. Appellate counsel did not raise
on appeal the issue of whether the evidence was outside the record of conviction, either directly on the
ground that the objection would have been futile in the trial court due to an adverse Court of Appeal decis
ion, or as an on the record ineffective assistance claim.

b. Supporting cases, rules, or other authority:

Sixth Amendment right to effective assistance of trial counsel; Fourteenth Amendment due process right
to effective assistance of appellate counsel in a state appeal given criminal defendants as a matter of right;
People v Trujillo (2006) 40 Cal. 4th 165, holds that a defendant's admission at a probation interview does
not come within the "record of conviction" that may be considered by a factfinder at the trial of a prior
conviction allegation to prove the nature of the prior.

MC-275

8. Did you appeal from the conviction, sentence, or commitment? ☒ Yes. ☐ No. If yes, give the following information:
- a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"): Court of Appeal, Sixth Appellate District
- b. Result Affirmed
- c. Date of decision: Sept. 27, 2000
- d. Case number or citation of opinion, if known: H019013
- e. Issues raised: (1) Admission of prelim testimony violated rights to confrontation and due process.
 (2) Instruction on evidence of prior domestic violence violated rights to due process and jury trial.
 (3) Trial judge violated jury trial right by not having jury decide as to count two whether gbi was inflicted
- f. Were you represented by counsel on appeal? ☒ Yes. ☐ No. If yes, state the attorney's name and address, if known:
Maribeth Halloran, 407 Marin Ave., Mill Valley, CA 94941, in assoc with 6th District Appellate Program
9. Did you seek review in the California Supreme Court? ☒ Yes ☐ No. If yes, give the following information:
- a. Result Denied
- b. Date of decision: Jan. 10, 2001.
- c. Case number or citation of opinion, if known: S092764
- d. Issues raised: (1) same as above
 (2) _____
 (3) _____
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:
Appellate counsel rendered ineffective assistance by failing to raise the issues. In the alternative, trial counsel could not raise issue 2 due to lack of specific objection on the meritorious grounds by trial counsel.
11. Administrative Review:
- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review.

- b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: Santa Clara County Superior Court

(2) Nature of proceeding (for example, "habeas corpus petition"): habeas petition

(3) Issues raised: (a) Relitigation of facts of 245 prior violated Double Jeopardy, was beyond the Statute of
(b) Limitations, admission of probation ev violated Miranda, biased judge.

(4) Result (Attach order or explain why unavailable): Denied

(5) Date of decision: Nov. 6, 2002.

b. (1) Name of court: Court of Appeal, Sixth Appellate District

(2) Nature of proceeding: habeas petition

(3) Issues raised: (a) same as above

(b) _____

(4) Result (Attach order or explain why unavailable): Denied.

(5) Date of decision: Feb. 5, 2003.

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

I have only recently received the advice of an attorney alerting me to the claimed grounds for relief.

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

I, the undersigned, say, I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

MC 275f

PETITION FOR WRIT OF HABEAS CORPUS

Habeas Petition, *In re Barnett*,

- 13 (c) (1) California Supreme Court (S113879)
Denial on October 15, 2003
Same grounds as above
- (2) U.S. District Court, N.D. Cal., 01-20748JIF
Grounds: same grounds as above
Result: Dismissed at petitioner's request to exhaust unexhausted claims on Oct. 7, 2002
- (3) California Supreme Court (S125212)
Denied on May 11, 2005
Grounds: Denial of Right to Confront Due to Second Judge reversing Order of First Judge that ordered the state to pay for the witness's transportation
- (4) U.S. District Court, N.D. Cal., 04-2782
Grounds: Claims denied by California Supreme Court in S113879 and S125212.
Result: Denied on March 29, 2006, due to Statute of Limitations.

Additional Allegation:

Although this is a successive habeas petition, I am entitled to relief because the grounds raised involve errors of constitutional magnitude which led to a trial that was so fundamentally unfair that absent the errors no reasonable judge or jury would have found the 243 (d) conviction to be a serious felony, or the section 245(a)(1) prior conviction to be a strike. (*In re Clark* (1993) 5 Cal.4th 750.)

Prayer for Relief:

Petitioner respectfully urges the court to issue a writ of habeas corpus, vacating the finding that the 243 (d) conviction was a serious felony, vacating the resulting two five-year enhancements imposed under section 667(a) without possibility of retrial of those issues in light of the jury verdict that petitioner did not personally inflict GBI, vacating the finding that the section 245(a)(1) qualified as a strike prior, and directing that petitioner be resentenced.

ACKNOWLEDGEMENT OF MAILING

I (A) Michael W. Barnett, am a resident of California State Prison-Los Angeles County (LAC) at Lancaster, County of Los Angeles, California, and I am at least 18 years of age. My mailing address is California State Prison-Los Angeles County, Facility MF, Bldg CTC, Bed 14, P. O. Box 4620, Lancaster, California 93539.

On (B) _____, 2007, I mailed a true and correct copy of the following document (s); **(YOU DO NOT HAVE TO GO INTO DETAIL ABOUT THE DOCUMENTS)**

Habeas Corpus Petition

On each party listed below by placing it in an envelope, with adequate postage or provided, and by depositing said envelope in a box for the United States Mail at LAC, 44750 60th Street West Lancaster, California 93536.

This copy is being mailed to (D):

Appellate Court
Sixth Appellate District

San Jose, Calif. 95113

I have mailed additional copies to (D): Attorney General Office
455 Golden Gate Ave Suite 11000
San Francisco, CA 94102-3664

There is regular delivery service by the United States Mail between the above place of mailing and the parties listed.

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated (E): _____, 2007, at Lancaster, California 93536.

Signed: _____, CDC#: P07058

Revised January 19, 2005

LAC MAILROOM ACKNOWLEDGEMENT OF MAILING

DATED: _____

SIGNED: _____

PG 7058 Barnett

LOVE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
BEFORE HONORABLE RENE NAVARRO
DEPARTMENT NO. 25

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS.

MICHAEL W. BARNETT,

DEFENDANT.

COPY

SENTENCING

SUPERIOR NO.:
198078

(ENDORSED)

FILED

AUG 9 1999

---000---

REPORTERS TRANSCRIPT OF PROCEEDINGS

STEPHEN V. LOVE
Deputy District Attorney
Superior Court of California County of Santa Clara

HELD ON AUGUST 4, 1998

By LOVE DEPUTY

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A P P E A R A N C E S:

FOR THE PLAINTIFF:

MATTHEW BRAKER,
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT:

CARL BEATTY,
DEPUTY PUBLIC DEFENDER,

OFFICIAL COURT REPORTER:

JACQUELINE VILLEGAS BARRON
CERTIFICATE NUMBER 8049

1 SAN JOSE, CALIFORNIA

AUGUST 4, 1998

2 PROCEEDINGS:

3 (WHEREUPON, COURT CONVENED AND THE FOLLOWING
4 PROCEEDINGS WERE HAD:)

5 THE COURT: ALL RIGHT. GOOD MORNING. WE'RE ON
6 THE RECORD IN THE MATTER OF PEOPLE VERSUS BARNETT. THE
7 RECORD SHOULD REFLECT THE PRESENCE OF MR. BRAKER ON BEHALF
8 OF THE PEOPLE, MR. BEATTY ON BEHALF OF THE DEFENDANT AND
9 MS. --

10 MS. BANUELOS: BANUELOS.

11 THE COURT: BANUELOS ON BEHALF OF THE ADULT
12 PROBATION DEPARTMENT.

13 THIS IS THE TIME THAT HAS BEEN SET FOR SENTENCING.
14 ARE BOTH PARTIES READY TO PROCEED?

15 MR. BEATTY: YES, YOUR HONOR.

16 THE COURT: DO YOU WAIVE FORMAL ARRAIGNMENT FOR
17 JUDGEMENT AND SENTENCE?

18 MR. BEATTY: YES, YOUR HONOR.

19 THE COURT: ANY REASON WHY JUDGMENT CANNOT NOW BE
20 PRONOUNCED?

21 MR. BEATTY: NONE.

22 THE COURT: ALL RIGHT. MR. BEATTY.

23 MR. BEATTY: YOUR HONOR, AT FIRST I WOULD LIKE TO
24 ADDRESS A COUPLE OF THE ISSUES WE DISCUSSED AT THE LAST
25 SESSION BEFORE THE CASE WAS CONTINUED.

26 IT'S MY CONTENTION THAT MR. BARNETT IS ENTITLED TO
27 HIS 4019 TIME BECAUSE 12022.7, THE GREAT BODILY INJURY
28 ALLEGATION WAS FOUND NOT TRUE.

1 AND I BELIEVE THAT THERE'S A REQUIREMENT THAT THAT
2 HAS TO SPECIFICALLY BE PLED AND PROVEN IN ORDER TO TRIGGER
3 THE PROVISIONS OF 2933.1, WHICH RESTRICTS CREDITS.

4 I DISCUSSED THIS INFORMALLY WITH THE PROBATION
5 OFFICER PRIOR TO THE SESSION THIS MORNING, I BELIEVE SHE'S
6 IN AGREEMENT.

7 SO I WOULD SUBMIT IT ON THAT BASIS.

8 SECONDLY, I WOULD STILL CONTEND THAT IN THIS CASE
9 THE TWO PROP 8 PRIORS DO NOT APPLY, BECAUSE THE JURY
10 SPECIFICALLY FOUND THE GBI ALLEGATION TO BE NOT THE TRUE.

11 I REALIZE THAT THERE IS SOME CASE AUTHORITY IN
12 CALIFORNIA INDICATING THAT THE GREAT BODILY INJURY IS
13 ESSENTIALLY EQUIVALENT TO SERIOUS BODILY INJURY. BUT I
14 DON'T THINK THERE'S ANY CASE ON POINT WHERE A JURY
15 SPECIFICALLY FOUND GREAT BODILY INJURY TO BE NOT TRUE AND
16 THE COURT WENT AHEAD AND PROCEEDED TO IMPOSE EXTRA TIME
17 UNDER THE PROP 8 FIVE YEAR ENHANCEMENT.

18 MY CONTENTION IS THAT IF GBI AND SERIOUS BODILY
19 INJURY ARE DIFFERENT, THEN THE PROVISIONS OF 1192.7 ARE NOT
20 TRIGGERED AND THE ENHANCEMENTS SHOULD NOT APPLY.

21 IF ALTERNATIVELY, THEY ARE ESSENTIALLY EQUIVALENT,
22 WHICH I BELIEVE IS THE DISTRICT ATTORNEY'S POSITION, THEN I
23 BELIEVE THE JURY VERDICT IS ENTIRELY INCONSISTENT AND IT
24 SHOULD BE EITHER SET ASIDE OR MR. BARNETT SHOULD BE ENTITLED
25 TO A NEW JURY TRIAL.

26 IF THE DISTRICT ATTORNEY IS CONTENDING THAT GREAT
27 BODILY INJURY IS AN ELEMENT OF PENAL CODE SECTION 243, AND
28 IF COUNT ONE AND TWO ARE IN FACT 654, WHICH I BELIEVE -- I

1 BELIEVE THEY'RE TO BE A CONSENSUS ON THAT ISSUE.

2 THEN IF THE JURY SPECIFICALLY FOUND GREAT BODILY
3 INJURY NOT TO BE TRUE, THEY FOUND AN ELEMENT OF THE OFFENSE
4 NOT TO BE TRUE. AND, THEREFORE, A 243 WAS NOT SUFFICIENTLY
5 PROVEN AND THE VERDICTS SHOULD BE SET ASIDE.

6 SO I WOULD EITHER ASK THE COURT TO GRANT MR.
7 BARNETT A NEW TRIAL, OR IN THE ALTERNATIVE, NOT TO IMPOSE
8 THE TWO ENHANCEMENTS UNDER PROP 8. AND THEN, YOUR HONOR,
9 THAT COVERS THE LEGAL ARGUMENT.

10 I'D LIKE TO ADDRESS SOME ROMERO ISSUES PERHAPS
11 AFTER THE DISTRICT ATTORNEY HAS A CHANCE TO RESPOND TO ANY
12 INITIAL COMMENTS.

13 THE COURT: ALL RIGHT. MR. BRAKER.

14 MR. BRAKER: THANK YOU.

15 I'VE PRESENTED THE COURT AND COUNSEL WITH A COPY
16 OF THE CASE OF PEOPLE VERSUS MOORE, M-O-O-R-E, 10 CAL. APP.
17 4TH, 1868 IN WHICH THE COURT STATES THE FOLLOWING:

18 "IN THE PUBLISHED PORTION OF THIS OPINION, WE
19 DETERMINE THAT A FELONY BATTERY COMMITTED BY MEANS
20 OF SERIOUS BODILY INJURY, PENAL CODE SECTION
21 243(D) MAY BE USED TO ENHANCE A SENTENCE UNDER THE
22 SERIOUS FELONY PROVISIONS OF PENAL CODE SECTION
23 667(A), BECAUSE THE TERM SERIOUS BODILY INJURY IS
24 ESSENTIALLY EQUIVALENT TO AND SYNONYMOUS WITH THE
25 TERM GREAT BODILY INJURY AS REQUIRED BY PENAL CODE
26 SECTION 1192.6(C)8."

27 I HAVE SHEPARDIZED THIS CASE AND REVIEW WAS DENIED
28 ON MARCH 10, '93.

1 AND FOR THOSE REASONS I WOULD ASK THE COURT TO
2 IMPOSE THE TEN YEARS AS REQUIRED, SINCE THEY WERE ALLEGED AS
3 PROP 8 PRIORS.

4 WITH RESPECT TO THE CREDITS, I THINK THAT'S A
5 LITTLE BIT OF A SEPARATE ISSUE.

6 2933.1 STATES, YOU'RE ENTITLED TO 15 PERCENT
7 CREDITS IF IT'S ONE OF THE OFFENSES ENUMERATED IN 667.5.
8 AND IN THAT SECTION IT DOES STATE, NO FELONY IN WHICH THE
9 DEFENDANT INFLECTS GREAT BODILY INJURY ON ANY PERSON OTHER
10 THAN ACCOMPLISHED WHICH HAS BEEN CHARGED AND PROVED PROVIDED
11 FOR IN SECTION 12022.7.

12 NOW, HERE IT WAS NOT CHARGED AND PROVEN UNDER
13 12022.7, SO I WOULD CONCEDE THAT THERE IS A WAY THE COURT
14 COULD FOLLOW THAT LAW AND NOT -- AND GIVE THE DEFENDANT HIS
15 20 PERCENT CREDITS.

16 BUT I WOULD ASK THE COURT TO FOLLOW THE LOGIC OF
17 PEOPLE VERSUS MOORE. AND SINCE THE TERMS ARE ESSENTIALLY
18 THE SAME AND IT SAYS HERE, THAT THE PERSON HAS PERSONALLY
19 INFLECTED GBI, AND THAT HAS BEEN PLED AND PROVEN THAT HE'S
20 ONLY ENTITLED TO 15 PERCENT CREDITS.

21 THE COURT: ALL RIGHT. THANK YOU.

22 MS. BANUELOS, ON BEHALF OF THE ADULT PROBATION
23 DEPARTMENT, ANY COMMENTS FROM PROBATION.

24 MS. BANUELOS: I'M SORRY? I DIDN'T HEAR THE LAST
25 PART.

26 THE COURT: ANY COMMENTS OR OBSERVATIONS?

27 MS. BANUELOS: I THINK MR. BEATTY ACCURATELY
28 REPRESENTED OUR POSITION, BECAUSE THE 12022.7 ALLEGATION WAS

1 FOUND TO BE NOT TRUE, THAT IT DOESN'T COME WITHIN THE LAW
2 WHICH REQUIRES THE 2933.1 CREDITS AND THAT 4019 DOES APPLY.

3 THE COURT: THANK YOU.

4 ANYTHING FURTHER THEN, MR. BEATTY, ON THAT ISSUE?

5 MR. BEATTY: NOT ON THOSE TWO ISSUES.

6 THE COURT: DO YOU WISH TO THEN CONTINUE WITH
7 RESPECT TO ORAL ROMERO AT THIS TIME?

8 MR. BEATTY: YES, YOUR HONOR.

9 YOUR HONOR, AT THIS TIME I WOULD ASK THE COURT TO
10 SERIOUSLY CONSIDER STRIKING AT LEAST ONE OF THE PRIORS
11 PURSUANT TO PEOPLE VERSUS ROMERO AND PEOPLE VERSUS
12 WILLIAMS.

13 I WOULD JUST -- THE COURT IS QUITE FAMILIAR WITH
14 THIS CASE, HAVING PRESIDED OVER THE TRIAL AND HAVING
15 REVIEWED MY CLIENT'S LETTERS TO THE COURT, AS WELL AS
16 REVIEWED HIS CERTIFICATES AND ALSO IS FAMILIAR WITH THE
17 VICTIM'S STATEMENT.

18 I THINK IT'S QUITE CLEAR IN BOTH THE LETTER MY
19 CLIENT HAS WRITTEN TO THE COURT THAT HE HAS EXPRESSED SOME
20 EXTREME REMORSE, EVEN DURING THE TRIAL, DURING HIS TESTIMONY
21 WHEN HE WAS RELAYING THE INCIDENT AND DISCUSSING HIS WIFE'S
22 INJURY, HE BROKE DOWN AND STARTED CRYING.

23 I THINK THERE'S NO QUESTION IN ANYBODY'S MIND,
24 EVEN IF YOU ASSUME HE USED POOR JUDGMENT, AND EVEN IF YOU
25 ASSUME HE LOST HIS TEMPER, I DON'T THINK THERE'S ANY
26 QUESTION IN ANYBODY'S MIND THAT HE WAS VERY SORRY ABOUT WHAT
27 HAPPENED, VERY SORRY ABOUT THE INJURY THAT HIS WIFE
28 SUSTAINED.

1 AND EVEN SUE GIBBS, MY CLIENT'S WIFE, MADE A
2 STATEMENT TO THE PROBATION OFFICER INDICATING THAT SHE DID
3 NOT WISH THIS COURT TO IMPOSE SUCH A STRINGENT SENTENCE, A
4 SENTENCE OF 25 YEARS TO LIFE OR AN INDETERMINATE SENTENCE OF
5 THAT NATURE.

6 SHE DIDN'T SPECIFICALLY STATE HOW MUCH TIME SHE
7 WANTED, AND OBVIOUSLY SHE'S NOT CURRENTLY ON GOOD TERMS WITH
8 MY CLIENT. BUT I THINK THE COURT SHOULD TAKE INTO CAREFUL
9 CONSIDERATION THE WISHES OF THE VICTIM, WHICH IS WHY WE WENT
10 THROUGH THE ENTIRE PROCEEDING IS TO CERTAINLY PROTECT HER.

11 I'D ALSO LIKE TO POINT OUT TO THE COURT, AS THE
12 COURT IS PROBABLY ALREADY AWARE, THAT MR. BARNETT HAS GONE
13 TEN YEARS WITHOUT ANY SORT OF FELONY CONVICTION. BOTH OF
14 HIS PRIORS INVOLVED CONDUCT FROM APPROXIMATELY TWO DECADES
15 AGO. ONE IS FROM 1979 AND ONE IS FROM 1982.

16 AND I PARTICULARLY INVITE THE COURT TO TAKE A LOOK
17 AT THE 1979 PRIOR, WHICH MY CLIENT SUFFERED, WHICH I BELIEVE
18 HE WAS 20 OR 21 YEARS OF AGE. IT WAS A ROBBERY. BASICALLY
19 A PURSE SNATCH. DID NOT INVOLVE A WEAPON, DID NOT INVOLVE
20 ANY PERSONAL INJURY. IT WAS COMMITTED, I BELIEVE, WITH A
21 TEENAGE COMPANION.

22 AND SINCE THAT WAS ALMOST 20 YEARS AGO, I WOULD
23 ASK THE COURT TO SERIOUSLY CONSIDER NOT IMPOSING THAT STRIKE
24 PRIOR AND NOT USING IT FOR PURPOSES OF THIS PROCEEDING.

25 THE COURT, UNDER THE WILLIAMS CASE, OF COURSE, IS
26 ALLOWED TO CONSIDER THE SERIOUSNESS OF BOTH THE PRESENT
27 OFFENSE AND THE PRIOR CONVICTION. AND I WOULD ARGUE THAT A
28 PURSE SNATCH DOES NOT RANK UP THERE, YOU KNOW, WITH OTHER

1 FELONIES THAT ARE PERHAPS CONSIDERED VIOLENT IN NATURE.

2 AND I DON'T MEAN TO NECESSARILY EXCUSE THE
3 CONDUCT, BUT A PURSE SNATCH 20 YEARS AGO, I DON'T BELIEVE
4 SHOULD CARRY AS MUCH WEIGHT AS AN OFFENSE INVOLVING WEAPONS
5 OR AN OFFENSE WHERE THERE WAS SOME SORT OF SERIOUS INJURY.

6 THE COURT ALSO HEARD FROM A WITNESS DURING THE
7 COURSE OF THE TRIAL, HIS NAME WAS RUBEN GOMEZ.

8 MY CLIENT HAS WORKED FOR MR. GOMEZ OFF AND ON FOR
9 A PERIOD OF SEVERAL YEARS DOING PAINT AND CONSTRUCTION AND
10 VARIOUS MANUAL LABOR JOBS. SO I THINK WE HAVE ESTABLISHED
11 THROUGH SWORN TESTIMONY, THAT MR. BARNETT HAS BEEN GAINFULLY
12 EMPLOYED.

13 I WOULD LIKE THE COURT TO ALSO CONSIDER THAT MY
14 CLIENT WAS DOING THE BEST HE COULD UNDER THE CIRCUMSTANCES
15 -- WHEN THIS UNFORTUNATE INCIDENT TRANSPIRED -- TO CARE FOR
16 HIS TWO CHILDREN. HE WAS TAKING THEM TO SCHOOL. ANY EXTRA
17 MONEY HE DID RECEIVE FROM JOBS, HE WORKED FOR CASH, HE
18 PASSED ON AT LEAST PART OF IT TO HIS WIFE TO CARE FOR HIS
19 CHILDREN.

20 AND I'D ALSO POINT OUT THAT MR. BARNETT HAS TAKEN
21 EXTENSIVE CLASSES WHILE INCARCERATED FOR THE PAST ALMOST
22 YEAR AND A HALF, CLASSES HAVING TO DO WITH DOMESTIC
23 VIOLENCE, CLASSES HAVING TO DO WITH SUBSTANCE ABUSE.

24 AND ALL THE CERTIFICATES AND LETTERS ARE INCLUDED
25 IN THE COURT'S FILE AND IT'S A SUBSTANTIAL NUMBER OF HOURS
26 THAT HE HAS COMPLETED.

27 AND PERHAPS THE DISTRICT ATTORNEY MIGHT ARGUE THAT
28 HE SHOULD HAVE TAKEN THESE CLASSES A LONG TIME AGO, BUT I

1 THINK, NEVER THE LESS, THE COURT SHOULD CONSIDER IT AS A
2 POSITIVE.

3 SO, BASICALLY, I WOULD ASK THE COURT TO CAREFULLY
4 CONSIDER MY CLIENT'S REMORSE; THE FACT THAT HE'S BEEN TEN
5 YEARS WITHOUT A FELONY CONVICTION; THE FACT THAT THE VICTIM
6 DOES NOT WANT HIM SENTENCED UNDER 25 YEARS TO LIFE; THE FACT
7 THAT HE DID HAVE A SUBSTANTIAL PERIOD WHERE HE WAS GAINFULLY
8 EMPLOYED, AND I WOULD ASK THE COURT TO TAKE A LOOK AT
9 STRIKING ONE OR BOTH OF THE PRIORS, IN PARTICULAR THE PRIOR
10 FROM 1979 INVOLVING THE PURSE SNATCHING.

11 THE COURT: THANK YOU. MR. BEATTY.

12 MR. BRAKER.

13 MR. BRAKER: THANK YOU.

14 THE PEOPLE'S POSITION IS THAT THE DEFENDANT IS A
15 LIFE LONG CRIMINAL WITH A CRIMINAL HISTORY DATING BACK
16 NEARLY A QUARTER OF A CENTURY. HE HAS CRIMES THAT ARE NOT
17 ONLY IN THE STATE OF CALIFORNIA BUT ALSO IN THE STATE OF
18 OREGON. IT'S A HISTORY WHICH INVOLVES REPEATED ACTS OF
19 VIOLENCE, EVERYTHING FROM STABBING AN INDIVIDUAL NUMEROUS
20 TIMES TO A ROBBERY OF A WOMAN.

21 I TAKE ISSUE WITH COUNSEL'S STATEMENT THAT THAT
22 WASN'T A SERIOUS OFFENSE. IT WAS A PLANNED PRE-MEDITATED
23 OFFENSE WHICH INVOLVED KNOCKING A WOMAN TO THE GROUND AND
24 THEN STEALING HER PURSE.

25 AND WITH RESPECT TO THE CURRENT OFFENSE, THAT IS
26 ALSO A CRIME INVOLVING VIOLENCE. THE VICTIM SUFFERED A
27 BROKEN NOSE AND SOME NERVE DAMAGE TO THE EYE. AND WHEN THE
28 COURT LOOKS AT THE CIRCUMSTANCES OF AGGRAVATION ENUMERATED

1 IN RULE 421, IT WILL SEE THAT VIRTUALLY EVERY ONE OF THOSE
2 RELATED TO THE INDIVIDUAL APPLIES TO THIS INDIVIDUAL. AND
3 SEVERAL OF THOSE RELATING TO THE CRIME APPLY.

4 AND FOR THOSE REASONS THE PEOPLE'S POSITION IS
5 THAT NO STRIKE SHOULD BE STRICKEN AND THE COURT SHOULD
6 IMPOSE 35 YEARS TO LIFE.

7 THE COURT: ANYTHING FURTHER, MR. BEATTY?

8 MR. BEATTY: NO, YOUR HONOR.

9 THE COURT: MATTER STAND SUBMITTED?

10 MR. BRAKER: YES.

11 MR. BEATTY: YES, YOUR HONOR.

12 THE COURT: ALL RIGHT. THANK YOU.

13 THE COURT HAVING HAD AN OPPORTUNITY TO SIT AS THE
14 TRIAL JUDGE IN THE TRIAL OF THIS MATTER AND TAKING INTO
15 CONSIDERATION THE ORAL COMMENTS THAT HAVE BEEN MADE BY
16 COUNSEL, AND TAKING INTO CONSIDERATION AND EXERCISING IT'S
17 DISCRETION, THE COURT HAS CONSIDERED WHETHER IN LIGHT OF THE
18 NATURE AND CIRCUMSTANCES OF DEFENDANT'S PRESENT FELONY OF
19 WHICH HE STANDS CONVICTED AND PRIOR SERIOUS OR VIOLENT
20 FELONY CONVICTIONS AS BORNE OUT BY HIS PRIOR HISTORY AND THE
21 INDIVIDUAL PARTICULARS OF HIS BACKGROUND AND HIS CHARACTER
22 AND HIS PROSPECTS AS KNOWN TO THE COURT, THE COURT FINDS AND
23 IS OF THE OPINION THAT THE DEFENDANT IS NOT DEEMED OUTSIDE
24 THE SCHEME AND SPIRIT OF THE THREE STRIKES LAW. AND
25 THEREFORE SHOULD NOT BE TREATED AS THOUGH HE HAD NOT
26 COMMITTED ONE OR MORE SERIOUS VIOLENT FELONIES.

27 MR. BARNETT, YOU OBVIOUSLY HAVE BEEN ENGAGED IN AN
28 ELEVEN YEAR REIGN OF MENTAL AND PHYSICAL ABUSE WITH RESPECT

1 TO THE VICTIM IN THIS MATTER.

2 AND ALTHOUGH YOU'VE ENGAGED IN SELF-IMPROVEMENT
3 PROGRAMS, THAT COMES A LITTLE BIT LATE IN YOUR LIFE. AND
4 ALL THOSE PROGRAMS ARE BASICALLY -- HAVE BEEN AS A RESULT OF
5 YOUR INCARCERATION IN THIS MATTER.

6 AND THE COURT GIVES VERY LITTLE WEIGHT, IF ANY, TO
7 THE ARGUMENTS AND THE POINTS THAT HAVE BEEN PUT FORTH BY
8 COUNSEL FOR THIS COURT TO STRIKE ONE OR EITHER OF THE
9 STRIKES. SO THE MOTION UNDER ROMERO WILL BE DENIED AT THIS
10 TIME.

11 ANY FURTHER COMMENTS WITH RESPECT TO SENTENCING?

12 MR. BEATTY: YOUR HONOR, IS THE COURT ALSO DENYING
13 THE MOTION FOR A NEW TRIAL?

14 THE COURT: I DIDN'T KNOW YOU WERE MAKING A MOTION
15 FOR A NEW TRIAL.

16 MR. BEATTY: WELL, IF THE COURT PLANS TO IMPOSE
17 THE TEN YEARS WORTH OF PROP 8 PRIORS, THAT WOULD BE MY
18 REQUEST.

19 THE COURT: ALL RIGHT. MR. BRAKER, DO YOU WISH TO
20 COMMENT ON THAT?

21 MR. BRAKER: I WOULD SUBMIT IT ON THE COMMENTS I
22 ALREADY MADE AS TO WHAT IS APPROPRIATE.

23 THE COURT: ALL RIGHT. THANK YOU.

24 THE COURT HAVING AGAIN CONSIDERED THE ORAL
25 ARGUMENTS OF COUNSEL, THE EVIDENCE THAT'S BEEN ADDUCED IN
26 THE TRIAL IN THIS MATTER AND THE -- HAVING SAT AS A TRIAL
27 JUDGE IN THIS MATTER, THE COURTS DEEMS THAT THERE IS
28 SUFFICIENT EVIDENCE FROM WHICH THE COURT COULD FIND EACH OF

1 THE ELEMENTS OF THE CRIME FOR WHICH THE DEFENDANT WAS FOUND
2 GUILTY OF AND THEREFORE THE MOTION FOR A NEW TRIAL IS
3 DENIED.

4 ANYTHING FURTHER THEN BEFORE THE COURT IMPOSES
5 SENTENCE?

6 MR. BEATTY: NO, YOUR HONOR.

7 THE COURT: MR. BRAKER.

8 MR. BRAKER: NO, YOUR HONOR.

9 THE COURT: VERY WELL THEN.

10 IT IS THE JUDGMENT OF THIS COURT THEN THAT
11 PROBATION BE DENIED. WITH RESPECT TO COUNTS ONE AND TWO,
12 THE DEFENDANT WILL BE COMMITTED TO THE CALIFORNIA DEPARTMENT
13 OF CORRECTIONS FOR A PERIOD OF 35 YEARS TO LIFE, CALCULATED
14 AS FOLLOWS: AS TO COUNT TWO, WHICH IS THE PRIMARY TERM, THE
15 COURT IS GOING TO IMPOSE 25 YEARS TO LIFE.

16 WITH RESPECT TO COUNT ONE, THE COURT IS GOING TO
17 IMPOSE 25 YEARS TO LIFE, HOWEVER, IT WILL BE STAYED PURSUANT
18 TO PENAL CODE SECTION 654.

19 IN ADDITION, AS TO COUNT TWO, THE COURT WILL
20 IMPOSE TWO FIVE YEAR TERMS CONSECUTIVE TO ONE ANOTHER AND
21 CONSECUTIVE TO THE 25 YEARS TO LIFE, WHICH THE COURT
22 PREVIOUSLY IMPOSED PURSUANT TO 667(A)/1192.7 FOR A TOTAL
23 TERM OF 35 YEARS TO LIFE.

24 WITH RESPECT TO COUNT -- REMAINING COUNTS THREE
25 AND FOUR, PROBATION WILL BE DENIED. THE COURT WILL IMPOSE A
26 COUNTY JAIL SENTENCE OF ONE YEAR CONCURRENT WITH THE TIME
27 ALREADY IMPOSED.

28 YOU'RE ENTITLED TO CREDITS. THE COURT IS GOING TO

1 DEEM THE DEFENDANT IS ENTITLED TO 4019 CREDITS AND
2 ACCORDINGLY GIVE THE DEFENDANTS 462 ACTUAL DAYS 230 4019 FOR
3 A TOTAL OF 692 DAYS.

4 IN ADDITION THERETO, THE COURT IS GOING TO ADVISE
5 YOU OF THE SUBSEQUENT FIVE YEAR PERIOD OF PAROLE
6 SUPERVISION, A RESTITUTION FINE OF \$200, AN ADDITIONAL
7 RESTITUTION FINE IN AN AMOUNT EQUAL TO THAT IMPOSED, WILL BE
8 IMPOSED AND SUSPENDED PURSUANT TO 1202.45 OF THE PENAL CODE.
9 AND THE COURT WILL FURTHER IMPOSE A \$132 CRIMINAL JUSTICE
10 ADMINISTRATION FEE TO THE CITY OF SAN JOSE.

11 ANYTHING FURTHER?

12 MS. BANUELOS: YES, YOUR HONOR.

13 COUNT TWO FALLS WITHIN 290.2 OF THE PENAL CODE
14 REQUIRING THAT THE DEFENDANT SUBMIT TO BLOOD AND SALIVA
15 SAMPLES ONCE HE GETS TO THE DEPARTMENT OF CORRECTIONS.

16 THE COURT: COURT WILL ORDER THE DEFENDANT SUBMIT
17 TO BLOOD AND SALIVA SAMPLES UPON REQUEST BY THE DEPARTMENT
18 OF CORRECTIONS.

19 MS. BANUELOS: THANK YOU.

20 THE COURT: ANYTHING FURTHER?

21 MR. BEATTY: NO, YOUR HONOR.

22 MR. BRAKER: NO, THANK YOU.

23 THE COURT: THANK YOU VERY MUCH.

24 EXCUSE ME, THERE IS ONE ADDITIONAL FACTOR WE NEED
25 TO DO.

26 MR. BARNETT, THE COURT HAVING SENTENCED YOU AT
27 THIS TIME, YOU HAVE A RIGHT TO APPEAL FROM THIS SENTENCE.

28 IF YOU WISH TO APPEAL, YOU HAVE TO FILE A WRITTEN

1 NOTICE OF APPEAL WITH THE CLERK OF THIS COURT WITHIN 60 DAYS
2 OF TODAY'S DATE.

3 IF YOU APPEAL AND ARE UNABLE TO HIRE AN ATTORNEY,
4 THE APPELLATE COURT WILL APPOINT A LAWYER TO REPRESENT YOU
5 AT NO COST TO YOU WHATSOEVER.

6 YOU ALSO HAVE A RIGHT TO HAVE A FREE TRANSCRIPT
7 AND RECORD OF THE PROCEEDINGS. AND THE NOTICE MUST BE FILED
8 IN A TIMELY FASHION.

9 ALL RIGHT. THANK YOU VERY MUCH.

10 STAND IN RECESS.

11 MR. BRAKER: THANK YOU.

12 MR. BEATTY: THANK YOU.

13
14 (WHEREUPON, THE PROCEEDINGS WERE ADJOURNED.)

15 ---000---

1
2 STATE OF CALIFORNIA)

3) SS.

4 COUNTY OF SANTA CLARA)
5

6 I, JACQUELINE VILLEGAS BARRON, HEREBY CERTIFY:
7 THAT THE FOREGOING IS A FULL, TRUE AND CORRECT TRANSCRIPT OF
8 THE TESTIMONY GIVEN AND PROCEEDINGS HAD IN THE
9 ABOVE-MENTIONED ACTION TAKEN ON AUGUST 4, 1998, THAT IT IS A
10 FULL, TRUE AND CORRECT TRANSCRIPT OF THE EVIDENCE OFFERED
11 AND RECEIVED, ACTS AND STATEMENTS OF THE COURT, ALSO ALL
12 OBJECTIONS OF COUNSEL AND ALL MATTERS TO WHICH THE SAME
13 RELATE, THAT I REPORTED THE SAME IN STENOGRAPHIC TO THE BEST OF
14 MY ABILITY BEING THE DULY APPOINTED, QUALIFIED AND ACTING
15 OFFICIAL STENOGRAPHIC REPORTER OF SAID COURT, AND THEREAFTER
16 HAD THE SAME TRANSCRIBED INTO TYPEWRITING AS HEREIN APPEARS.
17 I FURTHER CERTIFY THAT I'VE COMPLIED WITH CODE OF CIVIL
18 PROCEDURE 237(A)(2) IN THAT ALL PERSONAL JUROR IDENTIFYING
19 INFORMATION HAS BEEN REDACTED, IF APPLICABLE.

20 DATED: AUG 09 1999
21

22
23 Jacqueline Villegas Barron

24 JACQUELINE VILLEGAS BARRON

25 CERTIFIED SHORTHAND REPORTER, 8049
26
27
28

CERTIFICATE OF SERVICE

Case Name: Barnett v. Knowles

Case No.: _____

IMPORTANT: You must send a copy of ALL documents filed with the court and any attachments to counsel for ALL parties in this case. You must also file a certificate of service with this court telling us that you have done so. You may use this certificate of service as a master copy, and fill in the title of the document you are filing. Please list below the names and addresses of the parties who were sent a copy of your document and the dates on which they were served. Be sure to sign the statement below. You must attach a copy of the certificate of service to each of the copies and the copy you file with the court.

I certify that a copy of the Habeas Corpus
(Name of document you are filing (i.e., opening
brief, motion, etc.)

and any attachments was served, either in person or by mail, on the persons listed below.

Michael Barnett

Signature

Notary NOT required

Name

Address

Date Served

make Barnett 10100
California Medical Facility
P.O. Box 2500 G-324

U.S. District Court
Northern District of California
450 Golden Gate Ave
P.O. Box 36060
San Francisco, Calif 94102

Legal and
Confidential
Mail



c/o Creamer

8/24/08

